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Even The 21st Century Water Cooler Has Rules

Law360, New York (January 13, 2012, 12:44 PM ET) -- Social media has been likened to the water cooler of the 21st century. And while this seems to be the way the National Labor Relations Board would like to classify social media posts by employees, it is likely not how most employers would view such posts. Indeed, unlike the water cooler at the end of the hallway, accessible only to a company's employees, social media posts (such as those appearing every day on Facebook, Myspace, LinkedIn and Twitter) are accessible to a much broader audience — one with whom employers likely do not want to share certain information, including former employees, current, potential, or past customers and clients as well as competitors.

It would seem, however, that the NLRB does not recognize, or is not concerned with, that glaring distinction. In several recent advice memoranda, the NLRB took to task employers' decisions to discipline or terminate employees for work-related social media posts. However, in the most recent decision, involving the Public Service Credit Union, the NLRB summarized some key factors, the existence of which would permit employers to discipline and/or terminate employees for work-related social media posts.

To understand the issue, one must first examine the breadth of the NLRB's jurisdiction. The NLRB derives its jurisdictional authority from the National Labor Relations Act. The act does not apply only to large companies operating in multiple states, or only to companies with a unionized workforce. Instead, the act applies to almost all private sector employers regardless of the size of the workforce or the existence of a unionized workforce, so long as the company has an impact on "interstate commerce" — a term that has been very broadly defined over the years.[1]

Section 7 of the act is most applicable to the issue of social media posting and applies broadly to all covered employers, not just those with a unionized workforce. Section 7 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.[2]

In essence, Section 7 protects a covered employee's[3] right to engage in "concerted activity" undertaken for the "mutual aid or protection" of other employees. The NLRB has established a test for determining whether the conduct or action of a covered employee is "concerted activity," which includes a determination of whether the activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[4]

This question is highly fact-sensitive. The NLRB will find concerted activity when the evidence "demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise."[5] Indeed, even "individual activities that are the 'logical outgrowth of concerns expressed by the employees collectively' are considered concerted activities."[6]

Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, including where employees discuss shared concerns among themselves prior to any specific plan to engage in group action."[7] This is based on the NLRB's position that employees' discussion of shared concerns about terms and conditions of employment, even when "in its inception [it] involves only a speaker and a listener," is an "indispensable preliminary step to employee self-organization."[8]

Despite this apparent requirement of future action being related to self-organization, employers should be cautious. There need not be any evidence that the employees are contemplating future group action for there to be protected concerted activity.[9]

There is a silver lining, though. Comments made solely "by and on behalf of" an individual employee are not protected concerted activity.[10] The NLRB reached this conclusion in a recently issued advice memorandum regarding a charge filed by an employee of the Public Service Credit Union. In that case, the employee posted a comment on Facebook griping about a customer. The following was the message the employee posted during his lunch break:

> Some clown comes in today and asks if he can change his debit card PIN at the ATM. I tell him ours can't, but the closest one that can is about 10 minutes away. He mentioned the city of Ft. Collins. I tell him their machines can change the number. He calls an hour later and bitches about me saying that I sent him to Ft. Collins and he is going to close his account.[11]

This employee's post elicited the following "conversation" over the next several hours:

> Friend 1: *LOL* oh wow.
>
> Charging Party: I'm in rare form today. He has been with us a month. I'm like f**k him, then.
>
> Friend 2: How dare you make people drive all over Colorado to change their PIN? Bad bad man.
>
> Coworker 1: Don't forget to charge him the fee to close the checking.
>
> Charging Party: [Coworker 1], [M.] said the same thing, haha. I most certainly will if he follows through.

> Charging Party: [Friend 2], the $3.95 just isn't enough. If it doesn't cost a least a tank of gas, it just isn't worth it.
>
> Coworker 1: People are morons. Not to be mean.[12]

After a coworker brought these posts to the employer's attention, the company terminated the employee. The employee filed a charge against the employer alleging unfair labor practice.

In reviewing the charge, the NLRB specifically noted that the employee admitted to posting these comments out of "frustration" and that he was "not trying to get other employees to take any action."[13] The NLRB distinguished this case from others, in that these comments were merely an "individual gripe about a customer" and that the employee was merely "venting."

There was no language in the posts "suggesting that [the employee] sought to initiate or induce coworkers to engage in group action" and the "post did not grow out of a prior discussion about terms and conditions of employment with his coworkers or even reference terms and conditions of employment."

The NLRB also noted that follow-up comments posted over the next several days, while not the basis for the termination, also appeared to be nothing more than an "individual gripe." Indeed, none of the posts "cause[d] other employees to voice any shared concerns about working conditions."[14] In the end, the NLRB advice memorandum recommended dismissal of the charge, concluding that the Facebook comments did not amount to concerted activity.[15]

The 21st century water cooler presents employers with a multitude of issues with which to grapple, not the least of which is the entanglement between concerted activity and inappropriate griping. It is clear, however, that social media is not the free-for-all that some employees seem to believe it is — there are, indeed, limits.

Employers should be aware of those limits so that they do not become hostage to the social media posts of their employees. In this respect, the act only protects certain activities and comments by employees. While each incident will present its own unique set of facts, knowing the general guidelines will help employers to make legally defensible disciplinary decisions.

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[1] 29 U.S.C. 157.

[2] Id.

[3] Covered employees are defined pursuant to 29 U.S.C. 152(11), and include most employees other than supervisory employees.

[4] Meyers Idus., 281 NLRB 882, 885 (1986), aff'd sub nom., Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

[5] Id. at 886.

[6] Public Serv. Credit Union, Case 27-CA-21923 Advice Memorandum at p. 4 (issued Nov. 1, 2011), citing Five Star Transp. Inc., 349 NLRB 42, 43-44, 59 (2007), enforced, 522 F.3d 46 (1st Cir. 2008).

[7] Id.

[8] Meyers, 281 NLRB at 887.

[9] St. Margaret Mercy Healthcare Centers, 350 NLRB 203, 204 (2007).

[10] Public Serv. Credit Union, p. 4.

[11] Id. at p. 2.

[12] Id. at p. 2.

[13] Id. at p. 5.

[14] Id.

[15] Id. at p. 1.